Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas	)	CC Docket No. 00-4

COMMENTS OF KMC TELECOM INC.

KMC Telecom Inc. ("KMC") submits these comments in response to the Application by SBC Communications, Inc. ("SWBT") for Provision of In-Region, InterLATA Services in Texas ("Application"), submitted on January 10, 2000. KMC is a Competitive Local Exchange Carrier ("CLEC") that is authorized to provide service in Texas through three operating entities (KMC Telecom Inc., KMC Telecom II, Inc. and KMC Telecom III, Inc.).

KMC is a member of the Association for Local Telecommunications Services ("ALTS") and fully supports the comments it has filed herein. However, KMC has particular concerns regarding the need for a fresh look opportunity that would permit customers in long-term contracts with SWBT and other ILECs to switch to competing telecommunications providers without being subject to unconscionable or anticompetitive termination penalties and has previously filed a petition for declaratory rulemaking stressing the need for fresh look. Indeed, KMC understands that SWBT has taken the position that it will continue to impose termination penalties on customers that withdraw from long term contracts with SWBT in order to receive service from CLECs. KMC's initial comments are limited to the fresh look issue.

I. THE ENFORCEMENT OF CONTRACT TERMINATION PENALTIES IS INCOMPATIBLE WITH AN OPEN AND COMPETITIVE LOCAL EXCHANGE MARKET.

One of the most significant obstacles to the development of open local exchange markets is the potential for excessive termination penalties to be imposed on customers that seek to withdraw from long term commitments with ILECs. Customers are often *un*aware of these termination penalties, or if they are aware, the customer accepted such penalties because no alternative existed when it first subscribed to the ILEC's service. The customer accepted all terms and conditions offered by the ILEC because the customer needed the service, had no alternative, and wanted the best price possible. In most cases, the ILEC placed these excessive termination penalties in tariffs filed with the state commission. Customers usually discover their termination liability through a notice from the ILEC once the customer attempts to switch service from the ILEC to KMC. Due to the excessive financial penalty, customers cannot switch service to KMC. The threat of such penalties effectively renders such customers captive to the ILEC, insulates them from the benefits of competition and inhibits the ability of CLECs to compete effectively on an even playing field. Allowing ILECs to continue imposing such penalties, substantially inhibits the development of local exchange markets that are open to competition.

II. THE COMMISSION SHOULD REQUIRE A FRESH LOOK OPPORTUNITY.

This Commission has previously concluded that customer contracts executed in a less than fully competitive environment raise anti-competitive concerns that are detrimental to the interests of customers. The Commission has likewise determined that customers tied to long-term contracts once telecommunications markets open to competition are "captive" and should be given the opportunity to terminate those contracts without incurring "substantial costs." *Competition in the Interstate Interexchange Marketplace,* 6 FCC Rcd 5880, 5906 (1991), *order on recon.*, 7 FCC Rcd 2677 (1992). Moreover, in concluding that access markets should be opened to competition, the Commission stated:

> The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to "lock-up" the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude that certain LEC customers with long-term access arrangements will be permitted to take a "fresh look" to determine if they wish to avail themselves of a competitive alternative.

Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369, 7463-64 (1992).

In the Commission's recent decision approving Bell Atlantic's Section 271 Application for New York, *Application by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InteraLATA Services in the State of New York*, CC Docket No. 99-295, FCC 99-404) (rel. Dec. 22, 1999), the Commission acknowledged the suggestion of several commenters (including KMC) that the Commission should impose a "fresh look" requirement in that proceeding as part of its public interest analysis under section

271(d)(3)(C) of the Act. *Id.* at ¶ 391. In response, the Commission stated that "a similar issue has been raised by KMC . . . in a Petition for Declaratory Rulemaking, which is now pending before the Commission. We conclude that issues raised by parties in this proceeding relating to contract termination liability are more appropriately resolved in the context of that pending petition, and we thus decline to resolve the issue in this proceeding." *Id.*[1]

KMC submits that the Commission should impose a fresh look opportunity on public interest ground in this proceeding as necessary in order to assure that the local exchange market in Texas is open to competition. Absent a fresh look opportunity, the Commission cannot conclude that the local exchange market in Texas is open to competition. The Commission should also promptly grant KMC's fresh look petition. These steps will best assure that the market opening goals of Section 271 are achieved.

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[1] In its Petition for Declaratory Rulemaking, KMC urged the Commission to establish a "fresh look" opportunity permitting ILEC customers with long term contracts to terminate such contracts without liability for payment of any termination penalties. As explained in KMC's petition and reply comments, the threat of such liability is a considerable deterrent to competition, inhibiting ILEC customers from switching to CLEC providers to obtain more competitive price and service offerings. KMC cited concrete examples (some involving SWBT), where customers were unable to consider offerings of competitive carriers because of the imposition of termination penalties. A narrowly crafted "fresh look" opportunity would remove this inhibition and advance the goal of opening local exchange markets to competition. KMC proposed limiting the "fresh look" opportunity to services initiated *before* the date on which an incumbent LEC receives Section 271 approval for that state.

CONCLUSION

For the foregoing reasons, KMC Telecom, Inc. respectfully requests that the Commission impose a "fresh look" opportunity in this proceeding and, additionally, grant KMC's fresh look petition in CC Docket No. 99-142.

Respectfully submitted,

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Dated: January 31, 2000

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2000, copies of the foregoing COMMENTS OF KMC TELECOM, INC.; CC Docket No. 00-4, were served via **Messenger** or **Federal Express**** to the following parties:

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